No. 11426

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNION PACIFIC RAILROAD COMPANY a corporation,

Appellant,

vs.

MARTIN R. DEVANEY,

Appellee.

APPELLANT'S OPENING BRIEF.

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Statement.

The above action was brought by the plaintiff, a brakeman in the employ of the Union Pacific Railroad Company, for injuries alleged to have been sustained January 21, 1944, at El Cajon Station, San Bernardino County, California, when he tripped over some wires on a flat car contained in a freight train. Plaintiff charged that the defendant so negligently fastened a tractor to the floor of the flat car with wires that they became entangled in plaintiff's clothing. Plaintiff claimed that he sustained a hernia as the result of such negligence.

The case was tried May 7, 1946, before Judge Pierson M. Hall sitting without a jury. Judgment against defendant was entered in a total sum of $2,883.66, and defendant prosecutes its appeal therefrom.

The evidence in general was to the effect that plaintiff was the swing brakeman on a freight train which started, from Yermo, California, about 2:00 P.M. January 21, 1945. His duties as swing brakeman were to inspect the train at all opportunities and particularly the rear portion thereof. The flat car in question was about two-thirds of the way back in the train and was therefore in the portion of the train for which plaintiff was responsible. His duties on inspection included the duty to find and remedy defects such as the broken wire in question. The train had been thoroughly inspected by carmen at Yermo and was again inspected several times on the way without any defect being discovered. However, as the train was coming to a stop at El Cajon, the plaintiff went up alongside the tractors on the flat car, caught his trouser-leg in a broken wire, and fell off the car. At the trial he testified somewhat vaguely that he noticed an injury in the neighborhood of the abdomen that same night and noticed some swelling. However, several statements from the plaintiff himself—some in his own handwriting—and statements of other members of the crew were to the effect that plaintiff noticed no injury in that region for two or three weeks afterward. Plaintiff was, however, on February 16, 1945, discovered to

be suffering from a left inguinal hernia and was subsequently operated on by the Union Pacific doctors free of charge to plaintiff, as provided for by the Regulations of the Hospital Department to which plaintiff made contributions.

Although plaintiff in his complaint made a specific charge that the defendant was negligent in that it fastened a tractor to the floor of the flat car, he made no effort to prove that charge at the time of trial. Inferentially, it appeared that the defendant did not have anything to do with fastening the tractor in question to the flat car, but that this was done by the government, since the tractor in question had come from an army base at Utah, and was an army tractor. There being absolutely no evidence of negligence on the part of the defendant, the court relied on the doctrine of *res ipsa loquitur*. Defendant and appellant does not believe that doctrine was applicable under the circumstances shown by the evidence. In fact, even if the doctrine were applicable, it is believed that the testimony affirmatively proved that the defendant actually used due care, and that there was no contradictory evidence. Furthermore, it is believed that the evidence was utterly insufficient to support any inference that if plaintiff fell from the flat car as he alleged, such fall was the proximate cause of the left inguinal hernia.

Argument.

I.

The Evidence Was Utterly Insufficient to Support the Findings of Fact.

The findings of fact made by the trial judge were that the allegations of paragraphs I, II, III, IV, V and VI of the plaintiff's complaint were true. We have no quarrel with those findings so far as they apply to the first four paragraphs.

As to paragraphs V and VI, However, there was absolutely no evidence to support any finding that the allegations of those paragraphs were true. In paragraph V it is charged that the defendant fastened the tractor to the flat car with wires so negligently that they became entangled in plaintiff's clothing. There was not a scintilla of evidence to support any conclusion that the defendant had anything to do with fastening the tractor to the flat car or made use of any wires for that purpose. On the contrary, the evidence was that the tractors on the flat car were army tractors [R., 25]; that the point of origin was some big base in Utah [R., 203]. It is common knowledge that in the case of carload shipments, the carrier furnishes empty cars which are loaded by the shipper.

> "As a general rule, the carrier loads all inanimate or ordinary freight tendered in less than carload lots, while the consignor loads in all cases where, for his convenience, the car is placed at his warehouse or on public team tracks. This practice has grown up not only because the work can be more satisfactorily performed by the owner, but also because it is impossible for railroad com-

panies economically to load cars at private warehouses, or on those tracks where vehicles of the consignor or consignee come and go at discretion of the owner." 9 Am. Jur. 701.

If any inference at all is to be drawn as to who fastened the tractors to the flat car, the only permissible inference is that the government did so. Any finding that the defendant performed that act was not only unsupported by any affirmative evidence, but is contrary to the only possible inferences from such evidence as there was.

With respect to paragraph VI, note that the charge is that defendant violated the Federal Safety Appliance Laws in fastening the tractor to the flat car. The Safety Appliance Laws referred to are contained in Title 45, U. S. C. A., Sections 1 to 46, inclusive. By no conceivable construction can such laws be applied to the manner in which a load is secured to a flat car. In any event, as set forth above, there was no evidence that the defendant had anything to do with fastening the tractor to the flat car.

The second portion of paragraph VI is the only allegation in the complaint which makes a charge which could conceivably be supported by any evidence in the case. The charge there is "* * * and that by reason of the defendant's failure to provide a reasonably safe and proper place for the plaintiff to work, the plaintiff was caused to and did fall from said train * * *". However, as shown, there was no evidence that the defendant had anything to do with the use of the wires in question,

and the only inference was that government employees had used them. Therefore, there was no evidence of failure on the part of the defendant with respect to failure to provide a safe place to work. The evidence at the trial was that the train was thoroughly inspected at Yermo before it started, and that a defect such as broken wires would have undoubtedly been remedied at that time if it had existed at that time. Also, additional inspections by the plaintiff of that portion of the train disclosed no defect prior to the time when the train was pulling into Cajon. At that time plaintiff testifies that he tripped over the broken wire and fell from the train. Therefore, if defendant had a duty with respect to the wires, it was shown that it had made thorough and repeated inspections which disclosed nothing to be wrong with the wires until after plaintiff had taken over control of that portion of the train and after it was his own duty to keep the place of work safe. There was absolutely no evidence from which it could be inferred that the defendant or any employee of the defendant, other than the plaintiff, was guilty of any negligence with respect to providing plaintiff with a safe place to work.

It is submitted that there was absolutely no evidence upon which to base a finding that the allegations of pararaphs V and VI of the complaint were true. As shown above, the court resorted to the doctrine of *res ipsa loquitur,* but it did not refer to that doctrine in the findings and for that reason the judgment was not supported by findings which had any support in the evidence.

II.

The Doctrine of Res Ipsa Loquitur Does Not Apply in This Case.

The evidence was that the train had been thoroughly inspected by car inspectors at Yermo, which was the starting point of this train [R., 178]. The car in question was fourth or fifth ahead of the caboose [R., 29] or about two-thirds back from the engine [R., 87]. It was plaintiff's duty as swing brakeman to inspect the train at every stop for the condition of the running gear and the general safety of the train —to see that everything was in order [R., 24]. He made such an inspection at every opportunity on that trip [R., 88]. While he was vague about the exact places, it is apparent there was an inspection made at least at Barstow and Victorville [R., 90], either by himself or by the conductor, or both. If the wire had been broken at that time, it would have been fixed [R., 91]. While plaintiff tried to make it appear that he himself didn't inspect the left side of the train, it was clearly his duty to do so [R., 24, 150, 179]. The wire used for fastening the trucks was heavy, and fastening by such wire was one of the two customary methods [R., 154-156]. Plaintiff's counsel, seeing that the evidence was clear that the wire was not broken at the time inspection was made at Victorville attempted to show that it might have become broken as the train descended the grade to the point of accident [R., 188, 203, 204]. It is probable that that is exactly what happened. The least that can be said is that frequent inspections revealed no defect prior to that time.

This was the evidence from which the trial judge found that the defendant was guilty of negligence and that such negligence proximately caused plaintiff's hernia.

It should be remembered that the trucks were army trucks and there being no evidence on the subject, it must be assumed that the trucks were loaded on the flat cars by the United States Government in accordance with the usual custom. There can then be no inference of negligence with respect to receiving the loaded flat car from the government. The trucks were secured in an apparently substantial manner and in the usual and customary way. It is the legal obligation of the carrier to accept for transportation goods so delivered to it.

> "A carrier may not, however, arbitrarily determine that goods packed in a particular manner are not in proper shipping condition, and then refuse to accept them on that ground; the requirement of proper packing means such packing as experience has proved to be necessary to insure the goods being carried with a reasonable prospect of safety". 9 Am. Juris. 614.

There was no evidence in this case that the tractors were not secured in such a manner, and as shown, the evidence was, on the contrary, that the tractors were loaded in a secure and customary manner. It being the legal duty of the carrier to accept the tractors so packed for transportation, it surely can not be held negligent for doing so.

The evidence as to inspections en route is uncontradicted and can give rise to no inference of negligence. The testimony indicates that the wire was intact at Victorville, the last stop before the accident. There is

absolutely no evidence that it was not intact there, nor any evidence of actual or constructive notice to the defendant of the existence of any defect prior to the moment of accident. However, such notice as well as a reasonable opportunity to remedy the defect is absolutely essential to the imposition of liability.

> "Knowledge, then, or opportunity by the exercise of reasonable diligence to acquire knowledge, of the peril which subsequently resulted in injury to the employee is fundamental to responsibility on the part of the employer." 35 Am. Jur. 556.

McGivern v. M. P. Ry. Co., 132 F. (2d) 213. In that case an engine foreman who was riding the leading footboard of an engine apparently slipped off the footboard due to an accumulation of ice and snow, fell under the engine and was killed. The evidence showed that snow had been falling throughout the time after the crew reported for work and the time of the accident. The footboard had been cleaned once, but ice and snow accumulated on it again. There were suitable tools on the engine which could have been used to clean the footboard if the foreman had desired to do so. After a jury verdict for the plaintiff the trial court granted the defendant's motion for a judgment notwithstanding the verdict. The Circuit Court of Appeals affirmed the judgment. The opinion brings out the point that while an employer has a duty to furnish a safe place to work, he is not an insurer in that respect. Since the decedent himself was on the scene and was intimately acquainted with the condition of the footboard, and since the employer had provided tools with which he could have rectified the condition

if he had desired to do so, there was no negligence on the part of the employer, and the only negligence involved, if any, was that of the decedent himself. The decision is of interest by reason of its discussion of the general principles involved in a case similar to that at bar, and is also interesting because the engine foreman in the *McGivern* case occupied a similar position to that of the plaintiff in the case at bar with respect to being in charge of the portion of the employer's instrumentalities involved in the accident. The court will recall testimony that DeVaney's principal duties were to inspect the rear half of the train at all proper opportunities and to remedy any defects found. The employer therefore, having fully inspected the train at Yermo and found that there were no defects at that time, placed DeVaney in charge through the remainder of the trip. The probability is from the evidence that the wire broke as the train was coming down Cajon Pass and after the last inspection point. In any event, we know that the wire was not broken when the train left Yermo and that it broke some time during the journey, during which Mr. DeVaney's principal duty was to inspect the portion of the train in which the flat car was and to remedy any defects found. He was therefore in the same position as the engine foreman in the *McGivern* case. In that connection it might be pointed out that the law of California is similar in this respect.

In *Duffy v. Hobbs, Wall & Co.*, 166 Cal. 210, a foreman in charge of one portion of a saw mill was killed when a decayed post holding a railing gave way and precipitated him into the water below. The court held that since the deceased was in charge of that portion

of the saw mill, and since it was his own duty to inspect for and repair defects of that nature, the employer can not be charged for the results of the decedent's failure to keep that portion of the premises safe.

A case quite close on its facts to the case at bar is *Patton v. Tex. & Pac. R. Co.,* 179 U. S. 658; 45 L. Ed. 361. This case was brought under the Federal Employers' Liability Act. The evidence was that when the fireman stepped on a step in order to get off the engine as it was pulling into its own depot, the step turned under him due to a loose nut, thereby throwing him under the engine and causing injuries resulting in the amputation of his foot. The evidence was that the step had been inspected at the last previous inspection point, and had then been found secure. There was some evidence that the step had been removed at that last inspection point and reapplied. Plaintiff's argument was that the fact that the nut was loose shortly after such application indicated negligence in the manner of attaching the step. Numerous causes, however, were given for the loosening of the nut, such as the usual motion of the engine, the step striking some object, the throwing of lumps of coal onto the step when the engine was coaled. At the end of the evidence the trial court directed a verdict for the defendant. This was affirmed. The burden was on the plaintiff to prove actual negligence. Mere proof of the existence of the defective step was insufficient. In the same way, mere proof that the wires actually broke is no proof of negligence. There is no evidence that the wires were unsuitable, nor is there any evidence of negligence of any sort in causing the breaking of the wire.

In an attempt to escape the necessity of fulfilling the burden of proving that the wire broke due to negligence on defendant's part, and also to prove that the defendant had actual or constructive knowledge thereof in time to remedy the defect, both plaintiff's counsel and the trial court resorted to the doctrine of *res ipsa loquitur*. As a matter of fact, there was no negligence on the part of defendant, and the evidence proved it. Reference to the doctrine was, therefore, the last resort in an attempt to fasten liability on the defendant. However, even if the doctrine were applicable in this case, it is believed that the plaintiff's proof was insufficient. It is well established that the effect of applying the doctrine is merely to shift the burden of going forward with evidence. After all the evidence is in, the burden still remains with the plaintiff to prove negligence and proximate cause by a preponderance of all the evidence. In this case plaintiff's evidence as to negligence began and ended with the showing that plaintiff fell due to a broken wire. If it could properly be said that the mere showing that the wire broke cast upon defendant the burden of going forward with evidence that the break was not due to its negligence, it is submitted that such burden was fully met and that the effect of all the evidence was to leave no room for any inference of negligence on defendant's part. It was proved that the tractors were army material from a base in Utah; that they were secured to the flat car by blocks and heavy wire [R., 154]; that that was the usual method [R., 155, 156]; that the train was thoroughly inspected at Yermo [R., 178]; that it was again inspected during the trip and a broken wire was the sort of thing being looked for

[R., 179]; that the brakemen charged with the duty of inspection were furnished with adequate electric lanterns [R., 180]. The uncontradicted evidence was, therefore, that defendant exercised due care in accepting the shipment and in caring for it en route. In spite of that care, it appears that the wire broke after the last inspection point, but the evidence precludes any inference that the breaking was due to negligence on the part of defendant. Therefore, even if the doctrine were applicable initially, the effect of the uncontradicted evidence was to dispel all inferences based on the doctrine.

But we believe that the doctrine was not applicable under the circumstances existing in the case at bar. Two reasons have usually been assigned for invoking doctrine: first, that the instrumentality causing the accident is so much within the control of the defendant that evidence as to what actually happened is available to the defendant but not to the plaintiff, and it is therefore advisable to adopt a rule which will place pressure on the defendant to disclose the evidence as to what actually happened. Another reason assigned for invoking the doctrine is that evidence as to what actually happened is under the circumstances not easily available to the plaintiff and the cricumstances surrounding the accident are such that it seems probable that the cause of the accident is negligence on the part of the defendant. Neither of these reasons exists in the case at bar. The portion of the train containing the flat car in question was wholly within the control of the plaintiff himself. As swing brakeman it was his duty to inspect that portion

of the train for defects of this sort at every possible opportunity and to remedy such defects, if found. Evidence, therefore, as to the actual cause of the wire's breaking was much more available to the plaintiff than it was to the defendant. Also, the fundamental requirement that defendant be in control of the instrumentality in question was non-existent. As to the second reason for invoking the doctrine, there was absolutely no reason to suppose that the wire broke because of any negligence on the part of the defendant. It was not claimed by the plaintiff that there was any negligence in the operation of the train or in any other respect which could cause the wire to break.

The case cited by the trial judge as authority supporting the judgment against defendant is *Pitcairn v. Perry*, 122 F. (2d) 881 (C. C. A., 8th, 1941). Perry a car inspector was injured when a car door fell on him, due to its being in poor repair. It appeared that Perry was one of the crew of car inspectors assigned to inspect a freight train while it stopped temporarily at Moberly, Missouri. The door of a box-car was found to be open, so Perry and three others tried to close it by hand. This failing, one of the men went for a crowbar, and the four tried again with this aid, Perry wielding the bar. On this attempt the door left its fastenings at the top, and fell on Perry. The court held that *res ipsa loquitur* applied, and that the inference of negligence so supplied was sufficient to support a jury's verdict for Perry.

Even a cursory examination of the opinion shows that the two cases are entirely dissimilar so far as the application of *res ipsa loquitur* is concerned.

1. In the *Perry* case the evidence was that a door in proper repair could not be caused to leave its fastenings when handled as it was at the time of the accident.

> "The evidence showed that prying up the door as plaintiff did should not cause it to leave the track; that unless the metal parts of the door were so worn and corroded, or unless the wood was so rotten and defective that it would permit a slack of approximately an inch and a quarter, the accident could not have happened. Unless the door had been defective, prying upwards upon it as was done would not make it come off but would cause it to stay in at the top."

Therefore, there was a strong inference that there was a defect in the car, due to defendant's negligence in failing to keep it in repair. In the case at bar there is no evidence of any defect in any car or other instrumentality under the control of defendant.

2. In the *Perry* case the defect was not readily apparent by outward inspection of the sort which could be given en route. Even by working on the door in the attempt to close it, the defect was not discovered.

In the case at bar, frequent inspection showed no defect. But when the wire broke, the dangling ends became a defect, and one that was clearly apparent.

3. In the *Perry* case it was argued that control of the car door was not in defendant, but was in Perry. But as the court said:

> "The duty and responsibility of inspection of the top of the door was not plaintiff's. His op-

> portunity to observe a defect at night, the car in question being about eleven feet in height, was too limited in time and in physical possibility to make it reasonable to say that he was in control or that he had the means of knowledge of the dangerous condition existing, or its cause. Mere proximity to this car would not imply control over it nor would it detract from the control which the defendants at all times had over the instrumentality. At the time of the accident, plaintiff was only one of four employees attempting to close this door on a car then a part of a moving train which was stopped but temporarily in its movement."

In our case, it was plaintiff's specific duty, as swing brakeman, to care for the rear half of the train, to inspect it at all opportunities for defects such as broken wires, and to remedy them. Therefore, the "control" of defendant over that portion of the train had been delegated to plaintiff himself. The language above quoted from the *Perry* case indicates that if the facts had been like those in the case at bar, the decision would have been just the opposite. As set forth in the *Perry* case, it is essential to *res ipsa loquitur* that it be shown first that the thing which produced the injury was under the exclusive control and management of defendant—if it wasn't, but was rather under the control and management of the plaintiff, the doctrine is inapplicable.

See *Dryden v. Western Pacific R. R. Co.*, 1 Cal. App. (2d) 49, 54, in which the court said:

> "The doctrine of res ipsa loquitur cannot therefore be held applicable to the deceased. Such a rule can only be held applicable when the control of the instrumentality is in the employer or its servants, other than the injured person, for the doctrine itself is predicated on the principle that those in control have in some way been negligent."

4. In the *Perry* case it was shown that if the car door were in proper repair, it would not have fallen, *i. e.*, the fact that it fell indicated that proper care had not been used.

In the case at bar, the evidence was that similiar wires, similarly used, had broken on previous occasions [R., 156] without any intimation that such previous breaking was due to negligence. There was no showing that if due care were used, the wire would not have broken. Yet that is one of the essential fundamentals to applying the doctrine. It must appear that the happening in question is such that it ordinarily would not have occurred without negligence. It should also be remembered that the carrier was obliged to accept the tractors for transportation as prepared by the shipper, unless there was very evident insufficiency in such preparation. If such preparation were inferred to be negligent from the bare fact that the wire broke, such negligence might conceivably be referred to the shipper,

but surely not to the carrier in the absence of any evidence of any sort that the carrier was negligent in accepting the shipment.

For the above reasons we believe that under general legal principles the doctrine of *res ipsa loquitur* was not applicable in this case, and that the *Perry* case is no authority to the contrary.

III.

There Was No Evidence of Any Negligence on the Part of the Defendant Which Proximately Contributed to the Happening of the Alleged Accident.

Perhaps this point has been sufficiently covered above. It will be no doubt conceded that without the assistance of the doctrine of *res ipsa loquitur*, there was not a scintilla of evidence that defendant was negligent. There was no evidence that defendant actually secured the tractor to the flat car, or had anything to do with applying the wire which broke. There was no evidence that it was negligent to accept for transportation a tractor secured as this one was. There was no evidence that the use of this kind of wire was negligent. The uncontradicted evidence was that thorough and frequent inspections were made. There was no evidence that the wire was broken at such a time as to give defendant actual or constructive notice of the break, or an opportunity to remedy the situation. The result was a complete failure of proof to entitle plaintiff to a judgment.

IV.

There Was No Evidence of Proximate Causal Connection Between the Alleged Accident and the Injury Complained of.

At the trial plaintiff and his wife gave very unconvincing testimony to the effect that a "swelling" was found in plaintiff's abdomen the morning after the accident. However, the swelling referred to was that which would normally follow a blow to any tissues of the body, not to the protrusion caused by a hernia [R., 126]. On questioning by the court, Mrs. DeVaney's final testimony was that she knew "his stomach was red and swollen" [R., 131]. There was no evidence of an actual protrusion of the hernia until the examination by Dr. Ballachey on Feb. 16, 1944 [R., 109]. There was vague evidence by plaintiff that Dr. Ballachey found a hernia before February 16th, but that was categorically denied by the doctor. If plaintiff had made any claim that a hernia was caused by injury, it was the doctor's duty to make out an accident report immediately, and no such report was made [R., 113].

The reliable evidence on this subject is contained in the accident and other reports by plaintiff and the other members of the crew.

The earliest report is plaintiff's, on "Form 2611", dated March 4, 1944. In it he said, "No injurie noticed until about three weeks after accident". [R., 80]— Also: "After about three weeks my left side of my abdomen began to swell." [R., 81].

Being so notified that DeVaney claimed a hernia caused by accident on duty, claim agent Ford took a more de-

tailed report on April 22, 1944. In that statement, he said:

> "When I fell I did not notice any pain in the region of my groin to indicate I had received a hernia at the time. I had lost my breath and was a little shakey at the moment, thinking I was lucky I didn't go under, and I did not notice any pain in this area afterward until about two or three weeks later I noticed, after cohabitation with my wife, I noticed quite a severe pain and my left testicle swelled up to about the size of an orange. That is the first time I noticed any pain in this region." [R., 85].

In applying for accident insurance benefits, plaintiff stated he first went to a doctor in "early February". [R., 94].

When he entered the hospital, an interne took a history, which read in part, "About nine months ago (February, 1944) the patient noticed swelling of the left testicle and a few days later swelling in the left lower abdomen."

Can we believe plaintiff's testimony that he went to Dr. Ballachey on Jan. 22, in the face of those prior inconsistent statements? Such impeachment could be ignored only from a conscious or subconscious desire to do so.

And we find additional corroboration in the accident reports of the other members of the crew. Such reports were not made at the time of the alleged accident, as absolutely required in case of injury, for the reason that plaintiff denied being injured. Later, after the hernia had developed, plaintiff assigned the occurrence

of Jan. 21st as the cause, made his report of March 4th, and then the other crew members were called upon for their versions.

Plaintiff's witness, Kenneth Anderson, the rear brakeman, reported, "Brakeman DeVaney mentioned to me at the time of accident that he had fallen off Flat Car while we were pulling into Cajon passing track, but did not mention anything about being injured at this time." [R., 147].

Plantiff's witness, Robert Hopkins, head brakeman, reported, "He did not state that he was hurt much at that time but a few weeks later he complained about his side hurting." [R., 159].

Defendant's witness, Russell G. Brown, conductor, reported, "Brakeman DeVaney notified approx. 1 mo. later of these facts. Said he did not mention it at the time it happened because he did not think he was hurt." [R., 199].

The truth of the matter very evidently is that DeVaney first had pain in the left testicle about three weeks after January 21, 1944, and thereafter had a swelling in the left inguinal region—as he told Mr. Ford, and the interne at the hospital. How then can it be said that plaintiff proved that the fall off of he flat car caused his trouble?

As testified, every man has a potential hernia [R., 118] and an actual protrusion of viscera through the inguinal ring may be caused by any sort of activity [R., 120]. Both doctors testified that if the fall had caused such a protrusion, there would be immediate pain and immediate swelling [R., 113, 114, 119].

As counsel understands the subject, a predisposition to hernia exists in all males, because of the formation of a sac when the testicles descend from the abdomen to the scrotum in early childhood. Then, repeated intra-abdominal pressure, such as caused by heavy lifting, coughing, or straining at stool, has a tendency to force *viscera* into the sac. Repeated incidents tend to force the sac farther and farther down the inguinal canal, and a final incident may force sac and contained *viscera* through the inguinal ring. This final incident almost invariably is accompanied by intense pain and an immediately noticeable protrusion and swellng in the inguinal region. In the case at bar the reliable evidence is that plaintiff noticed such pain and thereafter such swelling about three weeks after the fall of January 21st. Both doctors testified that if a protrusion had occurred on January 21st, plaintiff would have had at that time immediate pain and immediate swelling. All the reliable evidence is that he did not notice any such pain or any such swelling. It should be borne in mind that the type of pressure required to cause the protrusion of hernia is intra-abdominal pressure. A fall such as that described by plaintiff would not cause such pressure. There would be a blow to the external walls of the abdomen, but not the type of blow which would cause the exertion of pressure from inside the abdomen. That sort of pressure can only be caused by flexion of the abdominal muscles. We see, then, that it was extremely unlikely that the fall had anything to do with the final protrusion of the hernia. On the other hand, such protrusion could be caused by coughing, straining at stool, lifting, or even by vigorous sexual intercourse. It is

significant that the plaintiff told Mr. Ford that he first noticed the pain and swelling immediately after having intercourse with his wife. If we are to look for probabilities, certainly the most probable cause of the final protrusion of the sac through the inguinal ring was this incident of sexual intercourse. The very least that can be said about this state of the evidence is that it was not proven that the fall of January 21, 1944, was any more probable a cause for the protrusion of the hernia than a great number of other probable causes.

It is submitted that the choice of the fall as the proximate cause of the protrusion of the hernia was most unfair to the defendant and was a miscarriage of justice.

Conclusion.

While the amount in money of this particular judgment is not large, nevertheless the question is an extremely serious one. If employees of common carriers by railroad under the provisions of the Federal Employers' Liability Act are going to be able to collect damages from their employers whenever they develop hernias, on such flimsy evidence of negligence on the part of the employer and such remote evidence of connection between such negligence and the causing of the hernia, then a very serious precedent with far-reaching consequences will have been established. Such occurrences in the past have been satisfactorily taken care of by free operative treatment, and where a definite connection exists between some incident occurring in the employment and the protrusion of the hernia, an allowance on account of wages actually lost while the hernia was

being repaired has been made. In this case the trial court has not only allowed a sum for pain and suffering, but has also allowed wages claimed to have been lost by plaintiff during a period of nearly a year, and this in spite of evidence that during 1944 the wages actually earned by the plaintiff were greater than those earned by him during the year 1943 [R., 136]. The defendant feels that there has been a gross miscarriage of justice in this case and that the judgment should be reversed with instructions to enter judgment in favor of he defendant.

Respectfully submitted,

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